PRO SE APPELLANT:

VERNON CARRUTHERS
Pendleton, Indiana

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IN THE
COURT OF APPEALS OF INDIANA

VERNON CARRUTHERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0508-CR-449
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Young, Judge
Cause No. 49G20-0106-CF-136595

December 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Vernon Carruthers appeals the trial court's denial of his petition to file a belated notice of appeal and appointment of counsel at county expense. Because Carruthers failed to challenge his sentence for a period of over three years and because he filed his petitions to file a belated notice of appeal approximately eight and ten months after the Indiana Supreme Court decided *Collins v. State*, 817 N.E.2d 230 (Ind. 2004), we affirm the trial court's denial of Carruthers' petition.

Facts and Procedural History

In June 2001, the State charged Carruthers with Count I: dealing in cocaine as a Class A felony and Count II: possession of cocaine as a Class B felony. The State later added Count III, which alleged that Carruthers was a habitual offender. Thereafter, Carruthers and the State entered into a plea agreement whereby Carruthers pled guilty to Count I as a Class B felony and Count III and the State dismissed Count II. Sentencing was left to the discretion of the trial court. In May 2002, the trial court sentenced Carruthers to twenty years for dealing in cocaine as a Class B felony enhanced by ten years for the habitual offender finding, for a total sentence of thirty years.

In October 2002, Carruthers filed a *pro se* petition for post-conviction relief alleging ineffective assistance of trial counsel and that he did not knowingly enter into his guilty plea.[1] Carruthers did not challenge his sentence in any respect. The post-

[1] In his petition, Carruthers indicated that he did not wish to have the State Public Defender represent him. In making this selection, Carruthers acknowledged that he was losing the right to representation from the State Public Defender for the duration of this proceeding, including any appeal therefrom.

conviction court summarily denied Carruthers' petition. Carruthers then filed a *pro se* motion to correct error, which the post-conviction court also denied. In September 2003, Carruthers filed a *pro se* Successive Petition for Post-Conviction Relief in this court. *See Carruthers v. State*, No. 49A04-0309-SP-470 (Ind. Ct. App. Sept. 17, 2003). Again, Carruthers did not challenge his sentence.[2] In January 2004, this court denied Carruthers' Successive Petition for Post-Conviction Relief because it found that he "failed to establish a reasonable possibility that he is entitled to post-conviction relief." Appellant's App. p. 131.

On July 7, 2005, Carruthers, *pro se*, filed a Motion for Permission to File a Belated Appeal and for Appointment of Counsel at County Expense,[3] which the trial court denied the next day. Carruthers then filed a Notice of Appeal, but apparently nothing became of this notice of appeal because on September 23, 2005, Carruthers filed a second Verified Petition for Permission to File a Belated Notice of Appeal and for Appointment of Counsel at County Expense. In this petition, Carruthers alleged in pertinent part that:

> 4. At the time of sentencing, the Court failed to inform Carruthers that he had the right to a direct appeal relating to the sentence imposed by the Court.

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[2] Carruthers did not include a copy of his successive petition for post-conviction relief in the record on appeal. Nevertheless, we have reviewed that petition.

[3] At the same time, Carruthers filed a Pro Se Petitioner's Entry of Appearance, wherein he stated that this *pro se* appearance "is for the limited purpose of proceedings held on Petitioner's Motion for Permission to File a Belated Appeal and for Appointment of Counsel at County Expense." Appellant's App. p. 133.

> 5. Pursuant to *Collins v. State*, 817 N.E.2d 230, 231-232 (Ind. 2004), Carruthers is required to attack his sentence by way of direct appeal.
>
> 6. That prior to the Indiana Supreme Court's issuance of its decision in *Collins, supra*, Carruthers attempted to address his sentencing issue by way of a petition for post conviction relief under Ind. Post-Conviction Rule 1.

Appellant's App. p. 153-54 (Sept. 23, 2005, petition to file belated notice of appeal). However, Carruthers did not submit any evidence in support of this petition, such as attaching an affidavit or relevant portions of the guilty plea or sentencing hearing transcripts.[4] The trial court summarily denied this petition the very same day. In October 2005, Carruthers filed a notice of appeal.[5] This court dismissed Carruthers' appeal in March 2006, but we later granted rehearing and reinstated the appeal.

Discussion and Decision

Carruthers contends that the trial court erred in denying his petition to file a belated notice of appeal. Pursuant to Indiana Post-Conviction Rule 2(1), a defendant may file a petition for permission to file a belated notice of appeal with the trial court where (1) the failure to file a timely notice of appeal was not due to the defendant's fault and (2) the defendant was diligent in requesting permission to file a belated notice of appeal. *Beatty v. State*, 854 N.E.2d 406, 409 (Ind. Ct. App. 2006) (citing Ind. Post-Conviction

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[4] In all fairness to Carruthers, his failure to attach a transcript from his guilty plea or sentencing hearing was not from his lack of trying. The record shows that during Carruthers' 2002 post-conviction proceedings, he filed two *pro se* motions requesting the guilty plea and sentencing hearing transcripts, but the post-conviction court denied both motions. And in Carruthers' October 19, 2005, Notice of Appeal, he requested the trial court to prepare the transcripts from his guilty plea and sentencing hearings. The trial court denied this "motion." *See* Appellant's App. p. 18, 168.

[5] Carruthers' October 19, 2005, Notice of Appeal provides that he is appealing from the trial court's September 23, 2005, order denying his petition to file a belated notice of appeal, not from the trial court's July 8, 2005, order denying his petition to file a belated notice of appeal.

Rule 2(1)), *reh'g denied*. The defendant bears the burden to prove both of these requirements by a preponderance of the evidence. *Id.* Post-Conviction Rule 2(1) also requires the trial court to consider the above two factors when deciding whether to grant or deny a petition to file a belated notice of appeal and to grant the petition where it finds that the defendant has established both factors. *Id.* (citing P-C.R. 2(1)).

Generally, the trial court has discretion in reviewing a petition to file a belated notice of appeal, and its decision will not be disturbed unless an abuse of discretion is shown. *Townsend v. State*, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006), *trans. denied*. However, where, as here, the allegations contained in the petition itself provide the only basis in support of a motion, we review the decision *de novo*. *Id.*

We first point out that Carruthers did not contest the length of his sentence for a period of over three years. Even if the trial court erroneously told Carruthers during his May 2002 sentencing hearing that he could not directly appeal his sentence, as Carruthers alleged in his petition to file a belated notice of appeal, the fact remains that Carruthers did not challenge his sentence in his petition for post-conviction relief, which he filed in October 2002. Carruthers also did not challenge his sentence in his successive petition for post-conviction relief, which he filed in September 2003. Instead, Carruthers waited to challenge his sentence until he filed his petitions to file a belated notice of appeal on July 7, 2005, and September 23, 2005, approximately eight and ten months, respectively, after the Indiana Supreme Court decided *Collins v. State*, 817 N.E.2d 230 (Ind. 2004). In *Collins*, our Supreme Court clarified that sentences following guilty pleas must be challenged by direct appeal and not by petitions for post-conviction relief. *Id.* at 233.

Given the above sequence of events, Carruthers should not be allowed to sit idly by for over three years and then capitalize on a favorable ruling resulting in the granting of a belated appeal. *See Jackson v. State*, 853 N.E.2d 138, 141 (Ind. Ct. App. 2006) (Barnes, J., dissenting), *trans. not sought*. Rather, a petition to file a belated notice of appeal should be granted as a matter of course where the defendant: (1) was sentenced following a guilty plea, pre-*Collins*; (2) was not advised of his right to appeal the sentence; (3) filed, within a reasonable time of sentencing, a petition for post-conviction relief seeking in part to challenge the sentence; and (4) then, post-*Collins*, filed a belated appeal to challenge the sentence. *See id.* at 142 (Barnes, J., dissenting). "*Collins*, however, should not be used to permit en masse filing of belated appeals to challenge sentences following guilty pleas, *especially ones where the defendant had never previously taken steps to attempt to challenge the length of his or her sentence*." *Id.* (Barnes, J., dissenting) (emphasis added). Because Carruthers did not challenge his sentence for a period of over three years, including not raising any sentencing claims in his post-conviction petitions, which impacts Post-Conviction Rule 2(1)'s requirements of diligence and lack of fault, the trial court properly denied his petition to file a belated notice of appeal.

Even if Carruthers' failure to challenge his sentence for a period of over three years is not fatal, Carruthers waited too long to file his petitions to file a belated notice of appeal. Our Supreme Court decided *Collins* on November 9, 2004, yet Carruthers did not file his petitions to file a belated notice of appeal until July 7, 2005, and September 23, 2005, approximately eight and ten months later. Based on this evidence, we conclude

that Carruthers did not diligently pursue his belated appeal. *See Roberts v. State*, 854 N.E.2d 1177, 1179-80 (Ind. Ct. App. 2006) (concluding that defendant was not diligent in pursuing belated appeal by waiting over eight months to file his petition), *trans. denied*; *cf. Salazar v. State*, 854 N.E.2d 1180, 1186 (Ind. Ct. App. 2006) (concluding that defendant was diligent in requesting permission to file belated notice of appeal where "[t]he first indication that Salazar was seeking relief under Post-Conviction Rule 2—his January 12, 2005 request for local counsel—was filed a scant sixty-four days after *Collins* was decided."), *trans. not sought*; *Cruite v. State*, 853 N.E.2d 487, 490 (Ind. Ct. App. 2006) (concluding that defendant was diligent in requesting permission to file belated notice of appeal where *Collins* was decided on November 9, 2004, and on February 14, 2005, the defendant requested counsel to pursue a belated appeal), *trans. denied*. The trial court properly denied Carruthers' petition to file a belated notice of appeal.[6]

Affirmed.

BAKER, J., concurs.

CRONE, J., dissents with separate opinion.

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[6] Given this conclusion, we do not address Carruthers' second argument that the trial court erred by denying his request for appointment of counsel at county expense. Given that Carruthers did not request counsel until July 7, 2005, and September 23, 2005—the same dates that he filed his petitions to file a belated notice of appeal—and we found that Carruthers waited too long in filing his petitions, the result of issue one would have been the same even if Carruthers was represented by counsel.

In any event, pursuant to our Supreme Court's recent opinion in *Kling v. State*, 837 N.E.2d 502 (Ind. 2005), it appears that the county appellate public defender does not become involved in Post-Conviction Rule 2 proceedings until "the trial court grants permission to file a belated notice of appeal or belated motion to correct error, or if an appellate court grants a person permission to file a belated appeal or reverses the trial court and orders the trial court to grant relief under P-C.R. 2." *Id.* at 507-08.

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CRONE, Judge, dissenting

I respectfully dissent. Under the facts of this case, I believe that Carruthers is entitled to a hearing to determine whether he has met the requirements of Post-Conviction Rule 2(1). In *Jackson*, 853 N.E.2d 138, the defendant was misinformed about the proper method for challenging his sentence, and the majority held that he was entitled to a hearing regarding his "diligence in seeking permission to file a belated notice of appeal after learning of the proper method for challenging his sentence." *Id*. at 141. In this case, Carruthers received no information at all regarding his right to challenge his sentence. Consequently, I am unswayed by the majority's observation that Carruthers did not contest his sentence for over three years. I would reverse and remand for a hearing to determine whether Carruthers was diligent in petitioning to file a belated notice of appeal

once he learned that he had a right to challenge his sentence and the proper method for doing so pursuant to *Collins*, 817 N.E.2d 230.[1]

[1] In *Jackson*, even the dissent acknowledged that there may be "circumstances where the defendant diligently pursued filing an appeal but did not timely do so, due to no fault of his or her own." 853 N.E.2d at 142 (Barnes, J., dissenting). Because the majority does not specifically reach the issue of whether the trial court erred in denying Carruthers's request for appointment of counsel, I need not do so here.